VOLUME 53

Abstract

(30)

(53 I.A.2 30)

General No. 10557 Agenda No. 10

STATE OF ILLINOIS

IN THE APPELLATE COURT

FOURTH DISTRICT

Herbert L. Jackson and Frances A. Jackson,

Plaintiffs-Appellees

vs.

Della F. Russell and The Citizens National Bank of Decatur, A Banking Corporation,

Defendants

# # #

Della F. Russell,

Defendant-Appellant

Appeal from the Circuit Court of Macon County

Smith, J.:

Plaintiff-buyers sued for specific performance of a written contract to purchase an improved 20 acres of farm lands. The Special Master found the equities in favor of the buyers, exceptions to his report were overruled by the Chancellor, and a decree for specific performance was entered against the seller.

Affirmed

General No. 10,[illegible] Agenda No. [illegible]

STATE OF ILLINOIS

IN THE APPELLATE COURT

[illegible] DISTRICT

Members L. Jackson and [illegible]
V. Jackson,

Plaintiffs-Appellees

vs.

[illegible]. Merrill and [illegible]
[illegible] Car Omni Bank of
Peoria, A Banking Corporation,

Defendants

Della F. Russell,

Defendant-Appellant

Smith, J.:

Plaintiff-buyers sued for specific performance of a written contract to purchase an improved [illegible] farm land. The Special Master found the equities in favor of the buyers, exceptions to his report were overruled by the Chancellor, and a decree for specific performance was entered against the seller.

The seller contends that her contract to sell should not have been specifically enforced against her because:

(a) Plaintiffs' occupied a confidential relationship, exercised undue influence and the contract price was sufficiently inadequate to constitute a fraud, and

(b) Plaintiffs do not come into equity with clean hands, as they failed to obtain written authority for improvements, failed to exhibit paid receipts, delayed payment of taxes, and took possession of an additional three acres and refused to vacate them.

Our problem and the rules applicable thereto have been recently succinctly stated as follows:

> "The sole question presented here is whether the vendee is entitled to specific performance of the real-estate contract. It is well established that the granting of such equitable relief is not a matter of right but rests in sound judicial discretion to be determined from the facts and circumstances of each individual case, (Young v. Kowske, 402 Ill. 114, 83 N.E. 2d 500; Morris v. Curtin, 321 Ill. 462, 152 N.E. 210; Anson v. Haywood, 397 Ill. 370, 74 N.E. 2d 489; Faulkner v. Black, 378 Ill. 112, 37 N.E. 2d 796) and where such enforcement would be inequitable or unconscionable, or where misrepresentations, unfairness, or superior advantage were responsible for the agreement, the remedy will be denied. Favata v. Mercer, 409 Ill. 271, 99 N.E. 2d 116; Franz v. Orton, 75 Ill. 100." Schiff v. Breitenbach, 153 N.E. 2d 549, 551, 14 Ill. 2d 611,616.

The seller contends that her contract to sell should not have been specifically enforced against her because:

(a) Plaintiff's conveyed a confidential relationship, exercised undue influence and the contract price was sufficiently inadequate to constitute a fraud, and

(b) Plaintiffs do not come into equity with clean hands, as they failed to obtain written authority for improvements, failed to exhibit paid receipts, delayed payment of taxes, and took possession of an additional three acres not released to vendee them.

One problem and one other opportunity have been recently successfully passed as follows:

> The sole question presented is whether the vendee is entitled to recover in ejectment upon the doctrine of the reasonable contingency. It is well established that the granting of each equitable relief is not a matter of right but rests in sound judicial discretion to be determined from the facts and circumstances of each individual case, (Young v. Downey, 4th Ill. 114, 45 N.E. 1d 390; Martin v. Curtin, 394 Ill. 462, 108 N.E. 1d; Anson v. McLeod, 397 Ill. 370, 74 N.E. 2d 489; Kunkmer v. Kinney, 414 Ill. 112, 37 N.E. 2d 796) and where such contingency would be impracticable or unconscionable, or where misrepresentations, materiality, or superior advantage were responsible for the agreement, the remedy will be denied. Favata v. Moccor, 409 Ill. 271, 99 N.E. 2d 116; Frana v. Orsen, 75 Ill. 100." Schultz v. Breitenbach, 133 N.E. 2d 840, 131 Ill. 2d 611,616.

To succeed, the plaintiff "must stand in conscientious relations toward his adversaries, and must not have obtained the agreement by unscrupulous methods, by overreaching or by taking undue advantage of his position, or by concealing important facts, even though his conduct is not actually fraudulent." Favata v. Mercer, 409 Ill. 271, 255, 99 N. E. 2d 116, 119. We thus turn to the evidence to find if the enforcement of this contract offends these principles of justice, equity, and good conscience.

The Jacksons were tenants of the Russells from 1947 until Mr. Russell's death in 1959. They continued as tenants of the widow until 1962. During Mr. Russell's lifetime, the Jacksons were interested in acquiring the 20 acres, but were told that it was not for sale. Talks were resumed after his death with the Jacksons offering $5,000.00 and defendant asking $6,000.00. The Jacksons wanted the property so they could provide a bath and separate bedrooms for a growing boy and girl, and Jackson told Mrs. Russell in January 1961 that they were interested in another place and "had to know whether our deal was going through, and she became hysterical, and a few days later she told me to

figure on buying her 20 acres." A few days later her attorney prepared the contract for $6,000.00 dated February 25, 1961, and she "went over the contract with the attorney with a fine-tooth comb and understood it," she said. Mrs. Russell further testified that she had "operated a collection agency and have been in active charge of it since my husband's death. I talked to Herbert every day from January 1961, until the day of the sale, except one day. I finally agreed to sell the land under force, because of my love for Herbert and his claim of love for me." "In 1960 and 1961, my relationship to the Jacksons was a mother and family relationship - they were like my own children."

During 1961, the Jacksons spent some $1,200.00 for improvements and repairs. They painted the house and garage, built a new bathroom, made over the hog house, and put in some new yard fences. These were all paid for. No receipts were furnished Mrs. Russell as the contract required nor did she request any. She was aware of most, if not all, of the improvements and offered suggestions as to others. Mrs. Russell testified that "after the contract was signed, Mr. Jackson didn't come to see me anymore, but he continued to farm for me, and his family

figure on buying her 50 acres." A few days later her attorney prepared the contract for $6,000.00 dated February 25, 1901, and she "went over the contract with the attorney with a fine-tooth comb and understood it," she said. Mrs. Russell further testified that she had "operated a collection agency and have been in active charge of it since my husband's death. I talked to Herbert every day from January 1901, until the day of the sale, except one day. A finally agreed to sell the land under force, because of my love for Herbert and his claim of love for me." "In 1900 and 1901, my relationship to the Jackson was a mother and family relationship - they were like my own children."

During 1901, the Jackson spent some $1,200.00 for improvements and repairs. They painted the house and garage, built a new bunkroom, made over the hog houses, and put in some new yard fences. These were all paid for. No receipts were introduced by Mrs. Russell as the contract required nor did she request any. She was aware of most, if not all, of the improvements and offered suggestions as to others. Mrs. Russell testified that "after the contract was signed, Mr. Jackson didn't come to see me anymore, but he continued to farm for me, and his family

seldom came to see me thereafter."

In February 1962, Mrs. Russell notified the escrowee to accept no further payments because no receipts for improvements were furnished her nor was there any written agreement for improvements. This notice was given a few days after she had asked Jackson to sign the land back to her and tendered him a written release of the contract to sign. Jackson refused to sign the release and insisted that the contract was legally binding. No notice of forfeiture of the contract was ever served on Jackson.

The Jacksons paid $1,000.00 on the date of the contract and thereafter made the following payments to the escrowee.

February 26, 1962	$1,300.00	Principal and interest
February 23, 1963	$4,240.00	Principal and interest in full
February 23, 1963	$ 188.74	For taxes
May 29, 1963	$ 190.38	For taxes

There is no claim but that this paid the contract in full.

Plaintiffs' suit, for specific performance was instituted in May 1962, alleged performance on their part and tendered all principal balance, interest and taxes.

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In February 1962, Mrs. Russell notified the escrowee to accept no further payments because no receipts for improvements were furnished but not was there any written agreement for improvements. This notice was given a few days after she had asked Jackson to sign the land back to her and tendered him a written release of the contract to sign. Jackson refused to sign the release and insisted that the contract was legally binding. No notice of forfeiture of the contract was ever served on Jackson.

The Jacksons paid $1,000.00 at the date of the contract and thereafter made the following payments to the escrowee.

February 26, 1962	$1,300.00	Principal and interest
February 23, 1963	$4,240.00	Principal and interest in full
February 25, 1963	$ 168.14	For taxes
May 29, 1963	$ 130.35	For taxes

There is no claim but that this paid the contract in full.

Plaintiffs' suit, for specific performance was instituted in May 1962, alleged performance on their part and tendered all principal payments, interest and taxes.

The Special Master found that no fraud, undue influence, duress, force or other coercion was exercised on the defendant; that defendant knew and understood the import and result of her actions; that no confidential relationship existed between the parties, and by her conduct defendant had waived any actions by the plaintiffs in technical violation of their agreements. The rule is well established in this state that, when the findings of a Master who heard the testimony and saw the witnesses is confirmed by the trial court, such findings will not be disturbed unless they are manifestly against the weight of the evidence. Strilky v. Levy, 33 Ill. App. 2d 91, 178 N.E. 2d 694; People ex rel Brady v. LaSalle Street Trust and Savings Bank, 5 Ill. App. 2d 261, 125 N. E. 2d 654. Rose v. Dolejs, 1 Ill. 2d 280, 116 N. E. 2d 402.

It is clear from the evidence that the parties were quite friendly prior to the execution of the contract and for about one year thereafter. For some reason unexplained in this record, in February 1962, the defendant sought an escape from her contract and tendered a release to the plaintiffs for signature. Upon their refusal to sign, she then notified the escrowee bank not to receive any further payments. On February 23, 1962, plaintiffs

The Special Master found that no fraud, undue influence, duress, force or other coercion was exercised on the defendant; that defendant knew and understood the import and result of her actions; that no confidential relationship existed between the parties, and by her conduct defendant had waived any actions by the plaintiffs for technical violation of their agreements. The rule is well established in this state that, when the findings of a Master who heard the testimony and saw the witnesses is confirmed by the trial court, such findings will not be disturbed unless they are manifestly against the weight of the evidence. Strilky v. Levy, 23 Ill. App. 2d 91, 178 N.E. 2d 694; People ex rel Brady v. Lasalle Street Trust and Savings Bank, 5 Ill. App. 2d 201, 125 N. E. 2d 654. Rose v. Daigle, 7 Ill. 2d 280, 116 N. E. 2d 612.

It is clear from the evidence that the parties were quite friendly prior to the execution of the contract and for about one year thereafter. For some reason unexplained in this record, in February 1952, the defendant sought an escape from her contract and tendered a release to the plaintiffs for signature. Upon their refusal to sign, she then notified the Lakeview Bank not to honor any further payments. On February 23, 1952, plaintiffs

tendered to the escrowee $1,300.00 representing the $1,000.00 principal payment due March 1, 1962, plus interest at 6% on $5,000.00. The record is then silent until May 1962, when plaintiffs filed their suit offering to pay principal, interest, and taxes. At this time no taxes were due under the contract. At this time improvements had been made by the plaintiffs and the bills for the same all promptly paid. It is readily apparent that by the acceptance of this offer, defendant would have been made whole. We think the plaintiffs are squarely within the holding in Lovins v. Kelly, 19 Ill. 2d 25, 166 N.E. 2d 69, where specific performance was granted a defaulting plaintiff who tendered performance prior to declaration of forfeiture.

It is significant that the defendant never sought or served notice of forfeiture of the contract. By her notice to the bank, defendant relied on failure to exhibit receipts or show a written agreement for improvements. For a year she stood by without any complaint on these points. For more than a year she was silent as to the now alleged inequitable, unjust, and unconscionable conduct of the plaintiffs. She was an experienced business woman operating a collection agency.

experienced business woman operating a collection agency. unconscionable conduct of the plaintiffs. The was an client as to the now alleged inequitable, unjust, and plaint on these points. For more than a year she was provements. For a year she stood by without any con- to exhibit receipts or show a written agreement for im- by her notice to the bank, defendant relied on testimo- sought or served notice of forfeiture of the contract.

It is significant that the defendant never ing plaintiff who considered performance prior to declara- tion of forfeiture.

24 69, where specific performance was granted a defaul- the holding in Lovins v. Kelly, 19 Ill. 2d 25, 166 N.E. made whole. We think the plaintiffs are squarely within by the acceptance of this offer, defendant would have been the same all promptly paid. It is readily apparent that ments had been made by the plaintiffs and the bills un taxes were due under the contract. At this time howev- to pay principal, interest, and taxes. At this time m until May 1962, when plaintiffs filed their suit offering terest at 6% on $3,000.00. The record is then silent $1,000.00 principal payment due March 1, 1962, plus in- tendered to the escrowee $1,300.00 representing the

Her own lawyer prepared the contract and she or he dictated its terms. She fixed the sales price, not the plaintiffs. She now claims she was coerced because of her love for Herbert and his claim of love for her. For some reason unexplained in this record, it apparently took flight within a year after the contract. She now claims the $6,000.00 sales price was inadequate and amounts to a fraud. It is the general rule that inadequacy of consideration, exhorbitance of price or improvidence in a contract will not, in the absence of fraud, constitute a defense for specific performance. Hotze v. Schlanser, 410 Ill. 265, 102 N.E. 2d 131. There is no evidence of misrepresentations, coercion, unfairness, or superior advantage attributable to the plaintiffs shown by this record. We cannot say that the judgment of the trial court is against the manifest weight of the evidence and it should be and it is hereby affirmed.

Affirmed:

CROW, P.J. and SPIVEY, J., concur.

Her own lawyer prepared the contract and she or he ter-
tated its terms. She fixed the sales price, not the plain-
tiff. She now claims she was coerced because of her love
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unemployment in this record, it appears...[illegible]
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hither of price or improvidence in a contract will not,
in the absence of fraud, constitute a defense for specific
performance. Kotka v. Schlamer, 410 Ill. App. 102 N.E.
2d 151. There is no evidence of misrepresentation,
concealment, unfairness, or superior advantage attributable
to the plaintiffs shown by this record. We cannot say
that the judgment of the trial court in observing the weight
test weight of the evidence and it should be and it is
hereby affirmed.

Affirmed:

CHOW, P.J. and SPIVEY, J., concur.

2nd DISTRICT
Abstract

2nd DISTRICT

53 I.A.2d 36

No. 11894

FILED

NOV 24 1964

HOWARD K. KELLETT
Clerk Pro Tempore Appellate Court Second District

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

PATRICIA CARL, Plaintiff-Appellant,	)	
vs.	)	Appeal from the Circuit Court of Kane County
GREAT LAKES INSURANCE COMPANY, a Corporation, Defendant-Appellee.	)	

MORAN - J.

This is an action in contract to recover the sum of $10,500.00, being the proceeds of an insurance policy together with interest and attorney's fees.

In March of 1960, Charles Carl, the plaintiff's decedent, purchased the policy of insurance in question from the defendant, paying therefore the first annual premium of $52.72. The policy insured the life of the decedent for the sum of $10,500.00 and provided in part as follows: "Self-destruction. In the event of self-destruction within two years from the date of issue of this policy, whether the insured be sane or insane, the insurance under this policy shall be a sum equal to the premiums paid thereon.

Charles Carl died on November 24, 1960, within the two year limitation set forth in the policy and the sole question presented by this appeal

2nd DISTRICT
Abstract

No. 11,294

FILED

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HOWARD K. KELLETT
District Surveyor Hopkins County Texas Deputy

is whether or not the death of Charles Carl was the result of self-destruction or suicide. If Charles Carl was not a suicide then the defendant is liable for the full amount under the policy. If Charles Carl committed suicide, then the defendant is only obligated to repay the premium, being the sum of $52.72.

At the time of his death, Charles Carl was a young man in apparent good health, residing with his wife and three small children in St. Charles, Illinois. He lost his job several days before his death and on Thanksgiving Day, the date of his death, he had gotten into a fight with his father-in-law at home after receiving a speeding ticket. One of his automobiles had been repossessed as a result of having missed several payments.

In the morning of that Thanksgiving Day he had been hunting with several friends and when he came home he unloaded his shotgun, as was his practice. The shotgun has a defective trigger and can be fired by a very light trigger pull or by simply dropping the gun on the ground from a height of one foot or more.

In the early evening of November 24, 1960, Charles Carl loaded his shotgun and carried it with him to the backyard saying to his wife that he was going to kill himself. After a few minutes Mrs. Carl went out into the backyard with their young baby in her arms. She talked to her husband and apparently thought that she had convinced him to return to the house. She stepped inside the backdoor and turned to look at her husband who had remained outside. Mrs. Carl was looking directly at her husband when the shotgun went off, inflicting fatal injury.

Within thirty minutes of the death, Mrs. Carl was interviewed by David R. Swanson, a St. Charles police officer and she told Officer Swanson, among other things, that her husband had said he was going to kill himself shortly before leaving the house. She repeated this statement to several other parties.

The defendant insurance company refused to pay the principal proceeds of the policy and tendered only the first year's premium to the plaintiff. The plaintiff rejected this offer of full settlement and brought the instant action.

A jury trial was had, resulting in a finding for the defendant and against the plaintiff. In brief, the jury found that the decedent had committed suicide. The trial court denied plaintiff's post-trial motion and entered judgment on the verdict. This appeal followed.

As has been said, the sole issue in this case is whether or not the decedent committed suicide. In this case, suicide is an affirmative defense and the burden is upon the defendant to prove that the decedent committed suicide by clear and convincing evidence. Kettlewell v Prudential Insurance Company, 4 Ill. 2d, 383.

Whether or not the decedent committed suicide is purely a question of fact. While there is a conflict of testimony in the case at bar, a reviewing court cannot substitute its judgment for that of a jury in passing upon the weight of the evidence and the credibility of the witnesses. Collister v Krobila, Inc., 30 Ill. App. 2d, 208. It is well established that where the evidence is conflicting, in order for a verdict to be contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent. Stone v Guthrie, 14 Ill. App. 2d, 127. Likewise a verdict should not be set aside merely because the jury could have drawn different inferences from the evidence. Danhof v Osborn, 10 Ill App. 2d, 529.

The trial court and jury saw and heard the witnesses. This court, after a full reading of the transcript, cannot see that a conclusion opposite to that reached b the jury is grossly apparent. In such a situation, this court will not substitute its judgment for that of the jury.

The foregoing presumes that the trial court committed no reversible error. The trial court did not err in denying plaintiff's motion for a directed verdict at the close of the defendant's case nor did the trial court err in denying the plaintiff's motion for judgment notwithstanding the verdict.

The plaintiff complains of the conduct of the trial judge. However, this court has read the entire transcript and we find no evidence of any misconduct. On the contrary, the trial judge conducted the trial impartially and fairly to both sides. The plaintiff also argues that a pall of suspicion was cast upon plaintiff's counsel when it was suggested that the death weapon, a shotgun had been tampered with. A gunsmith, called as a witness by the plaintiff, testified that someone had tampered with the gun. The plaintiff can hardly object to this testimony in view of the fact that it came from the mouth of one of her witnesses. In addition, the plaintiff opened the door to tampering testimony by introducing proof that the gun was in the same condition at the time of trial as on the date of death. This, despite repeated admonitions from the trial judge that this testimony was opening the door on the question of tampering. We find no error in the admission of testimony in this regard.

The plaintiff also complains that the trial judge refused certain of plaintiff's instructions. However, the plaintiff's post-trial motion does not specify which instructions should have been given and plaintiff cannot urge error on review unless he has specifically directed the trial court's attention to the matter in his post-trial motion, Ill. Rev. Stat. 1963, Ch. 110, Sec. 68.1. It should be pointed out further that the instructions about which plaintiff complains simply defines the phrase "self-destruction." The trial judge concluded that this was a commonly understood term and that the jury would not be enlightened by a definition. No error was committed in refusing to give this instruction.

Plaintiff also asserts that the trial court committed error in refusing a special interrogatory. This point was not raised in the post-trial motion and cannot be raised in this court. Ill. Rev. Stat. 1963, Ch. 110, Sec. 68.1.

The plaintiff also argues that the trial court refused to consider the affidavit of a bystander, stating in substance that he overheard members of the jury discussing the case before final argument. The conduct of a juror cannot be brought to the attention of the trial court in this form. It is well settled that a jury verdict will not be impeached by the affidavit of the jurors or others, Schiff v Oak Park Cleaners and Dyers, 132 N.E. 2d, 416, Wyckoff v Chicago City Railway Co., 234 Ill. 613.

The plaintiff contends that she should be entitled to interest due to the failure of the defendant to pay the principal amount and to attorney's fees since defendant's failure was vexatious. The jury verdict indicates that the failure of the defendant was not unreasonable nor vexatious and since plaintiff cannot recover the principal sum in this case she would not be entitled to interest.

The plaintiff's case is obviously a sympathetic one. The decedent left behind him a wife and three small children. This Court is sympathetic to the plaintiff's position and we are certain that the trial judge and jury were equally sympathetic. However, we cannot permit this natural sympathy to override well established legal principles. The judgment is therefore affirmed.

Affirmed.

Abrahamson, P. J., and Carroll, J., concur

Plaintiff also asserts that the trial court committed error in refusing a special interrogatory. This point was not raised in the post-trial motion and cannot be raised in this court. Ill. Rev. Stat. 1965, ch. 110, sec. 68.1.

The plaintiff also argues that the trial court refused to consider the affidavit of a bystander, stating in substance that he overheard members of the jury discussing the case before final adjournment. The conduct of a juror cannot be brought to the attention of a trial court in this form. It is well [illegible] affidavit of the juror [illegible] 132 N.E. 2d [illegible] 7 Ill. App. 2d [illegible].

The plaintiff complains that she was not given credit for the failure of the police officer to [illegible] fees since defendant's failure was vexatious. The jury verdict indicates that the failure of the defendant was not unreasonable. [illegible] since plaintiff cannot recover the [illegible] entitled to interest.

The plaintiff's [illegible] deceased left behind [illegible] sympathetic to the plaintiff's position and we also [illegible] and jury were equally sympathetic. However, [illegible] sympathy to override well established legal principles. The judgment is therefore affirmed.

Affirmed.

Abrahamson, P. J., and Carroll, J., concur

No. 64-17

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FILED

NOV 24 1964

HOWARD K. KELLETT
Clerk Pro Tempore Appellate Court Second District

In the Matter of People, ex rel, Village of Glen Ellyn, Appellee	)	
vs.	)	Appeal from the County Court of DuPage County
Marjorie Sherman, Appellant	)	

CARROLL - J.

The defendant, Marjorie Sherman, was charged with the violation of an ordinance of the Village of Glen Ellyn, DuPage County, Illinois, in a complaint which in substance alleged that on December 24, 1962 she unlawfully operated a motor vehicle in said village in violation of "D.W.I. Chap. 23, Sec. 735". On March 9, 1963 she was found guilty by a jury in the court of Police Magistrate Edward H. Fell and fined $150.00 and costs. On March 28, 1963 she perfected an appeal from the judgment of conviction to the County Court of DuPage County. On October 22, 1963 she filed a motion to suppress certain evidence and also filed a separate motion to dismiss the complaint on the ground that the same was insufficient to charge any criminal offense. The disposition of these motions, if any was made, is not disclosed by the record. The cause was set for trial on November 20, 1963 at 2:00 o'clock p.m. at which time defendant's objection to such motion was sustained. At 4:25 p.m. on

3pp

In the Matter of People, ex rel,
Village of Glen Ellyn,

Appellee

vs.

Marjorie Sherman,

Appellant

Appeal from the
County Court of
DuPage County

CARROLL - J.

The defendant, Marjorie Sherman, was charged with two violations of an ordinance of the Village of Glen Ellyn, DuPage County, Illinois, in a complaint which in two counts alleged that on September 15, 1962 she unlawfully operated a motor vehicle in act violation of [illegible] Ill. Rev. Stat. 1961, ch. 95½, sec. 27". [illegible] found guilty by a jury in the court of Police Magistrate [illegible] fell and fined $1.00 on each case. On March 15, 1963 she perfected an appeal from the judgment of conviction to the County Court of DuPage County. On October 22, 1963 she filed a motion [illegible] certain evidence and also [illegible] complaint on the ground that the same was insufficient to [illegible] any criminal offense. The objection to these motions, if [illegible] was made, is not disclosed by the record. The cause was set for trial on November 21, 1963 at 2:00 o'clock p.m. at which time [illegible]

the same day the case was called for trial and defendant again moved for a continuance. The record recites that after a hearing on said motion the court entered the following order: "It is hereby ordered as follows: 1. That defendant's motion for a continuance be and is hereby denied; 2. That the defendant's appeal from the Police Magistrate's Court be and is hereby dismissed; 3. That a writ of procedendo issue out of this court to the Police Magistrate Court of Edward Fell of Glen Ellyn." From such order defendant prosecutes this appeal.

One of the grounds upon which defendant urges reversal is that the trial court erred in dismissing her appeal from the Magistrate's Court.

The dismissal order fails to disclose the reason prompting its entry. It merely recites that the defendant's motion for a continuance was denied and the appeal dismissed. However we would assume from plaintiff's argument in this court that the parties understood that the appeal was dismissed for want of prosecution because the defendant unsuccessfully sought a continuance when the case was called for trial. Apparently the trial court interpreted such action by the defendant as tantamount to abandonment of her appeal and dismissed the same for want of prosecution. Accordingly the decisive question confronting us is whether the situation disclosed by the record warranted entry of the trial court's order.

It is the general rule that on appeal from a judgment of a Justice of the Peace or Police Magistrate the case is tried de novo in the reviewing court. I.L.P. Justices of the Peace, Sec. 122. Here the record shows that this case was called for trial on November 20, 1963 and that at that time the defendant was in court, and moved for a continuance. It is thus made clear that defendant evidenced

no intention of abandonment or failing to prosecute her appeal. Whether the defendant was ready for trial is not disclosed by the record but even if such was the fact it afforded no ground for dismissing her appeal. When her motion was denied the case being triable de novo the only action which the court could properly take was to order the trial to proceed at once. Regardless of whether or not she was ready for trial or had any defense to the charge in question she was entitled to have the plaintiff prove its case against her. The burden of going forward with the case in the county court rested upon plaintiff the same as it did in the Magistrate's Court. Until plaintiff had finished its side of the case the court had no way of knowing whether the defendant was ready to offer her defense. Likewise until such time it could not be determined whether plaintiff's proofs were sufficient to sustain the charge in the complaint. Langenhaur v. Stickney, 90 Ill. 361.

It is correctly asserted in plaintiff's brief that when a party appealing from a judgment of a Justice Court fails to prosecute the appeal it is proper for the court to which the appeal is taken to dismiss the appeal. However such rule may not be invoked against defendant in the instant case for the simple reason that she did not fail to prosecute her appeal. DeLeuw v. Carrigan, 19 Ill. App. 193 and Gray v. Gray, 6 Ill. App. 2d 571 cited by plaintiff are clearly not in point.

For the reasons indicated the order of the County Court of DuPage County is reversed and the cause remanded to that court with directions to proceed in conformity with the views herein expressed.

REVERSED AND REMANDED

ABRAHAMSON, P. J. and MORAN, J. concur.

V53 #1

(43)

53 I.A.2 43

Gen. No. 64-54 Agenda No. 47

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Defendant In Error, -vs- EARL T. HUNTER, Plaintiff In Error.	WRIT OF ERROR TO THE CIRCUIT COURT OF MADISON COUNTY

DOVE, P. J.

At the March Term 1961 of the Circuit Court of Madison County, the grand jury returned a three-count indictment charging Donald Franklin McClain, Robert Hugh Green and Earl T. Hunter with committing the offenses of burglary and larceny. The defendants entered pleas of not guilty. Thereafter, on September 19, 1961, an order of nolle prosequi was entered as to the defendants McClain and Green, and on November 15, 1961, a jury trial was had, resulting in two verdicts, one of which found defendant, Hunter, guilty of burglary, and the other finding him guilty of larceny and finding the value of the property stolen to be $1000.00. Both verdicts found the age of the defendant to be 40 years.

On November 22, 1961, a hearing was had in aggravation and mitigation, and at the conclusion of this hearing, defendant

was sentenced to the Illinois State Penitentiary to serve an indeterminate sentence as provided by law, the court fixing the minimum duration of his imprisonment at three years, and the maximum duration of his imprisonment at seven years. To reverse this judgment and sentence, the record is before us for review.

It is argued by counsel for defendant, (1) that upon the trial of this cause incompetent and prejudicial evidence was introduced, (2) an erroneous and prejudicial instruction was given to the jury, at the request of the State's Attorney, and (3) that his counsel, in the trial court, was incompetent.

What the record shows is that this indictment was returned by the grand jury of Madison County on March 27, 1961, and on March 30, 1961, the three defendants, McClain, Green and Hunter, were present in court, and were furnished with a copy of the indictment, list of witnesses and also a copy of an alleged confession, together with the names and addresses of the witnesses thereto. At that time Mr. Austin Lewis was appointed their attorney by the court, and a plea of not guilty was entered by each defendant.

On April 14, 1961, the court was informed by Mr. Lewis that the defenses for the three defendants were inconsistent. The court thereupon appointed Moses Harrison, counsel for defendant Green; Austin Lewis for defendant McClain; and John Morrisey, Jr. for defendant Hunter.

On April 24, 1961, the cause was called for hearing upon the regular jury setting, but upon the written application of Mr. Morrisey, court-appointed counsel for defendant Hunter, the cause was taken off of the setting and continued. On June 14, 1961, Mr. Morrisey reported to the court that he had been dis-

charged by the defendant, and that defendant had informed counsel's secretary that he had employed private counsel, and leave was granted Mr. Morrisey to withdraw as court-appointed counsel. On June 22, 1961, Mr. Morrisey entered his appearance as private counsel for defendant Hunter.

A motion for a severance was thereafter made and denied. On June 26, 1961, a motion, by defendant Hunter, for a continuance, supported by the affidavit of Mr. Morrisey, because of the absence from the state of three named witnesses, was made and granted, and the cause was set for September 18, 1961. On that day defendants, McClain and Green, were present in court, accompanied by their respective attorneys. Mr. Morrisey, representing Mr. Hunter, was also present, but his client, Mr. Hunter, was not, and Mr. Morrisey informed the court that he did not know why his client was not present. Defendant was at liberty on bail, and upon the motion of the State's Attorney, defendant's bond was declared forfeited, and a capias was issued for the apprehension of this defendant.

The following day, Mr. Hunter appeared in court with his counsel, Mr. Morrisey, and explained to the court that he believed the case had been set for trial for that day instead of the previous day. Upon Mr. Morrisey's motion, the order forfeiting the bond and directing a capias to issue was vacated, and defendant was "permitted to continue at liberty on his present bond." At this time on motion of the State's Attorney, a nolle prosequi order was entered as to defendants McClain and Green.

On November 13, 1961, defendant was present in court with his employed counsel, Mr. Morrisey, and the trial was entered

upon. A jury was selected, and two days later its verdict, as indicated, was returned. A hearing in aggravation and mitigation was had on November 22, 1961, at which hearing Mr. Morrisey was present and represented the defendant, and following this hearing, sentence was imposed and a mittimus was directed to issue.

Honorable Kenneth F. Kelly was thereafter appointed, by the Supreme Court, to represent defendant, and on December 16, 1963, defendant, acting through his court-appointed counsel, filed his praecipe for a trial court record, and in this court defendant is most ably represented by Mr. Kelly.

In support of his contention that defendant was represented by "incompetent and inexperienced counsel at the trial", present counsel criticizes Mr. Morrisey, the former Public Defender of Madison County, now deceased, for failing to request a preliminary hearing before the court, as to the voluntary character of the confession, and for his failing to interpose any objection to the confession when it was offered in evidence.

The record discloses that Theodore Zankl was called as a witness for the prosecution and after he had testified that he was a patrolman in the East St. Louis Police Department, the Assistant State's Attorney, out of the hearing of the jury, had the confession marked for identification as Exhibit 1, and then stated to the court and counsel, at the bench and out of the hearing of the jury, that he intended to offer the statement in evidence, and to question the witness in connection therewith, but desired to give defendant an opportunity to object "to the voluntary character of the confession prior to any

questions being put in the presence of the jury."

The record shows that counsel for defendant had been furnished with a copy of the confession, together with the names and addresses of the witnesses thereto, many months before the trial, and counsel had had ample opportunity to consult with his client in connection therewith and presumably did so. After the Assistant State's Attorney had had the confession identified as an exhibit and stated that he intended to offer the confession in evidence, the examination of Patrolman Zanki proceeded after counsel for defendant had stated that he had no objection thereto. The witness, Mr. Zanki, then examined the exhibit and testified that he was present when defendant signed it, and that it was signed at the interrogation room of the police station; that Sergeant Theriac, a police patrolman, conducted the interrogation, and did the typewriting; that he, Theriac, who was a first cousin of defendant, asked Hunter the questions and Hunter made the replies, and that the statement correctly reflects the information that defendant gave in his answers to the Sergeant's questions; that defendant signed the confession, and that the witness and Sergeant Theriac signed as witnesses, and that no persons, other than defendant, Sergeant Theriac and Theodore Zanki, were present when the confession was signed.

The witness further testified that the interrogation of the defendant began at 3:25 o'clock in the morning of February 17, 1961; that defendant was wide awake and alert; and was made no promises, and was not mistreated in any way. The confession was then read to the jury by Mr. Zanki, without objection, and the people rested. Sergeant Theriac did not testify, but his absence was accounted for by his son, who testified that at the

time of the trial his father, the Sergeant, was ill with pneumonia and confined to the hospital.

The defendant testified in his own behalf and in the course of his examination said that he was born in East St. Louis, was 40 years of age, and had lived in East St. Louis all his life; that he attended school there and was in the eighth grade when he quit school, and that he was a construction truck driver. He further testified that on February 15, 1961, he arose about five o'clock a.m. and spent "about all day" drinking at the Mound House and other taverns; that on the following afternoon he was taken to the police station.

As abstracted by his counsel, the defendant then testified: "They," the police, "took us to jail and locked us up. I was almost constantly interrogated by Michael Schwartz, Joseph Rodriguez, and later by Fred Theriac and Ted Zanki. The questioning began about fifteen minutes or a half hour after they had taken me in. It was way before three twenty-five a.m. Mike Schwartz made threats or promises. He had a big ring of jail keys and said: 'You will either talk to me or I will beat your brains out.' This statement marked People's Exhibit 1. That is my handwriting, but I signed a paper for them to turn my car over to my wife. I never made no statement of that kind. They showed me that once before in the police station. This statement here has got my handwriting there, but I didn't make the statement. I did not commit the burglary of the Tobermen Grain Company at St. Jacob."

On cross-examination, as abstracted, the defendant testified: "Officer Schwartz threatened me. He had a big bunch of keys in

his hand and said: 'If you don't talk to me, I will beat you to death.' That was soon after they arrested me that evening. I never signed any statement for Officer Schwartz. My wife picked the car up a short time after I was in jail. Any papers I signed was for my wife to get the car. He, Schwartz, said: 'Give it to me, sign this, and we will give your wife the car and keys.' I have signed a blank piece of paper before. I don't deny this is my handwriting. The only thing on this piece of paper was what is at the top. The printed portion of the stationery. There were three pieces of paper, one was for my record, one for the police department, and one for her."

The statement, identified as People's Exhibit 1, is on a letterhead of the Police Department of the City of East St. Louis, is dated February 17, 1961, time 3:25 a.m., and is as follows:

"Subject: Voluntary Statement of Earl T. Hunter."

"The following is a voluntary statement given by Earl T. Hunter, in the Interrogation Room, Police Headquarters, East St. Louis, Illinois, to Sergeant Fred J. Theriac and Patrolman Ted Zankl.

I, Earl T. Hunter, white, male, age 40, was born in East St. Louis, Illinois, I am married and reside with my wife, Helen, at 704A Summit Avenue, East St. Louis, Illinois. At the present time I am unemployed. I am a chauffer and work out of Local 729; I give this statement of my own free will, without threats or promises of reward, to Sergeant Fred Theriac and Patrolman Ted Zankl, and have been informed by them that this statement can be used against me in a court of law.

Around 3:00 p.m. Wednesday, February 15th, I, Earl Hunter, was in the Mound House Tavern, located at 460 Collinsville Ave. when a Robert Green walked in and we started drinking. Later we left the Mound House Tavern, and I, Earl Hunter, drove to a Donald McClain's Home, 39D Roosevelt Homes; there we picked up McClain and we visited numerous taverns in East St. Louis, Illinois; the three of us stayed around East St. Louis, and when it got dark, we got into my car, a 1952 Plymouth, and started riding around.

We later drove out Route 40 and stopped at an unknown tavern where we had another drink; after this we left and kept driving until we got to St. Jacob, Illinois; while in St. Jacob, Illinois,

the three of us broke into a Grain Elevator, by going through a window.

We removed from an office in this Grain Elevator, a number of electric calculators, a typewriter, and an electric shaver, and a flash camera. We brought these articles back to East St. Louis, where all three of us carried it up to Green's room, 335A Collinsville Avenue, until we found some place to sell them.

I find this statement true to the best of my knowledge. (One Page).

/s/ Earl T. Hunter

Sgt. Fred Theriac
Patr. Ted Zankl

In his argument, counsel for defendant says that a reading of this record discloses a serious question as to the competency of the legal representation given defendant by his counsel. "How John Morrisey," continues counsel, "who was first appointed as attorney for the defendant, Earl T. Hunter, was able to withdraw, and within a matter of eight days, become a privately employed attorney in the case, certainly deserves close scrutiny. The situation can hardly be said to be one other than that of the defendant being represented by court-appointed counsel."

The defendant was entitled to a fair trial and to be represented in the trial court, as in this court, by competent counsel. It does not follow, however, that because defendant's counsel did not object to the admission of the confession in evidence, and thereafter did not move to strike the testimony of Mr. Neuman as to the cost of some of the stolen articles, that counsel was incompetent. In People v. Reeves, 412 Ill. 555, the court quoted from United States v. Ragan, 166 Fed.2d 976, where it is said: "The conduct of counsel in the trial of a case is that of only one of the officers of the court whose duty it is to see that the defendant receives a fair trial. He is only one of the actors in the drama. The best of counsel

makes mistakes. His mistakes, although indicative of lack of skill or even incompetency, will not vitiate the trial unless, on the whole, the representation is of such low caliber as to amount to no representation, and to reduce the trial to a farce."

In the recent case of People v. Dean, 31 Ill. 2d.214, 201 N. E. 2d. 205, after stating that an accused is entitled to a fair trial which includes competent counsel, the court said (p. 218) : "This does not mean, however, an accused is denied competent counsel because his court-appointed counsel chooses a course of action which in retrospect proves to be less desirable than an alternate, nor even because he errs." (See also People v. Hare, 25 Ill. 2d. 321, 185, N.E. 2d. 178).

Whether trial counsel was court-appointed counsel or counsel selected by defendant, present counsel's assertion that defendant did not receive a fair trial, and "was prosecuted rather than defended by his own trial attorney", is not sustained by the record.

Where a defendant selects his own attorney, failure of such counsel to exercise care and skill in the trial of the case does not afford a basis for reversing a judgment of conviction. (People v. Morris, 3 Ill. 2d. 437). In those cases where a defendant is represented by court-appointed counsel, however, such assigned counsel must have sufficient ability and experience to fairly represent the defendant, present his defense, and protect him from undue oppression. In the instant case, the defendant had made a written statement and confession, and thereby placed his lawyer in a difficult position. It does not appear that at any time prior to the time judgment was rendered in this case did defendant ever express any dissatisfaction with his attorney,

and no evidence is pointed out which might have been produced in defendant's favor but was omitted. An examination of the entire record convinces us that there is no merit in defendant's contention that trial counsel was incompetent and prosecuted, rather than defended, his client.

It is also insisted by counsel for defendant that the trial court erred in giving to the jury this instruction on behalf of the People: "The court instructs the jury that if the jury are satisfied beyond a reasonable doubt from the evidence in this case, when considered in connection with the confession, that the crime charged in the indictment has in fact been committed, and if the jury are satisfied beyond a reasonable doubt that the confession is free and voluntary, whether made before or after arrest, and that the confession is true, such confession may be sufficient to warrant a conviction."

It is argued that the effect of giving this instruction was to direct a verdict of guilty against the defendant. This is not a peremptory instruction. It does tell the jury that if the jury was satisfied beyond a reasonable doubt, from the evidence, that the confession was true and was satisfied beyond a reasonable doubt, from the evidence, that the confession was free and voluntary, that then the confession <u>may</u> be sufficient to warrant a conviction, provided the jury are further satisfied, from the evidence, beyond a reasonable doubt that the crime charged in the indictment has been, in fact, committed. This instruction was considered at the conference on instructions, and no objection was made

by counsel then representing defendant. Present counsel insist that a confession "can never, of itself, constitute proof of the corpus delicti, and is not sufficient to warrant a conviction." As this objection was not made at the conference on instructions, it cannot be made here. In our opinion, however, the instruction is not subject to the criticism directed against it, and it was not reversible error to give it.

The incompetent and prejudicial evidence of which defendant now complains was elicited from the witness Ohlen Neuman, who was called by the State's Attorney, and who testified that at the time of the burglary the Toberman Grain Company was engaged in the feed and grain business at St. Jacob, Illinois, and that he was manager thereof. He described the several buildings, warehouses, grain tanks and offices of the company and their location in Madison County, a block south of Route 40. He further testified that when he arrived at his place of business at eight o'clock on the morning of February 16, 1961, the office was in "a mess", the files, emptied from the filing cabinets, were on the floor, and he enumerated the items of the company which were missing. He further testified that when he left the premises on the evening of the 15th of February, the window on the west side of the warehouse was locked or secured by a nail in each corner, and on the following morning, when he arrived, he observed that there were marks on the window sill, and that the nails had been pushed out of place and the window had been pried open.

This witness enumerated the missing items as a Frieden's Electric Calculator, a Remington Electric Adding Machine or Calculator, a Royal Typewriter, a radio, a camera and case, a flash holder, a carton of bulbs, an electric razor and a box of

twenty-two sets of silverware, which the company was using in a feed promotion deal. This witness was then asked if he had ascertained the value of these items as of February 15, 1961, and he replied in the affirmative. The State's Attorney then asked: "Will you tell the court and jury what the values were that you were able to fix on these items?" Counsel for defendant objected, stating: "I will object, your honor. He testified these would be replacement costs, not the value of the items themselves." The court sustained the objection. Later this witness, without objection, did state the cost of the several items, and was then asked to state the fair cash market value of the items on February 15, 1961, and his answer was that the Frieden's Calculator was fairly new and worth $700.00, the Remington Calculator was worth $200.00, the Royal Typewriter, $100.00, and the radio, $25.00. He further testified that the several items, other than the silverware, had thereafter been returned to the Grain Company by the Deputy Sheriff of Madison County.

Counsel for defendant insists that Mr. Neuman was not qualified to testify as to the value of the stolen electric calculators, the typewriter, camera, razor, or silverware, and states: "It is no answer to say that plaintiff in error's counsel did not object where the plaintiff in error claims that his appointed counsel was incompetent; as the court will consider the error assigned, even though objection was not made at the trial."

The response of the witness to the State's Attorney's question, to state the fair cash market value of the several items on February 15, 1961, was responsive, and the fact that the witness,

without objection, did state the cost of the several items which were stolen, did not affect the verdict and was not so prejudicial as to require a reversal of this judgment.

The evidence discloses that during the night of February 16, 1961, the office of the Toberman Grain Company was broken into, entered, and items of personal property therein were stolen. Among the items stolen were an electric adding machine or calculator, camera and flash bulbs. On the afternoon of February 17, 1961, the defendant was arrested, and in company of the arresting officer, went to a pawn shop, and the owner of the pawn shop later identified defendant as one of the persons who had previously pawned the calculator. The officer then took the calculator and defendant to the police station, and thereafter, on the following day, he, the defendant, signed the confession heretofore referred to. Theodore Zankl, patrolman of the police department, also testified that defendant told him that the camera and light bulbs were at his home, and this officer, accompanied by Sergeant Theriac, went to defendant's home in East St. Louis, and these articles were given to them by defendant's wife.

The defendant denied that he had anything to do with the commission of the offense with which he was charged. His account of what he did previous to his arrest was that he had been drinking heavily, and that during the afternoon after the burglary he met McClain and Green at a tavern, and there had a conversation with them; that he gave them the keys to his car, and they were gone between half an hour and forty-five minutes; that McClain was looking for a fellow he said he knew who could

sell the stolen property, but was unable to find him,and that he drove McClain and Green back to Lou's Pawn Shop in East St. Louis, and McClain took the calcularor into the pawn shop,but returned shortly to the car with the calculator; that he drove McClain and Green around some more, and then they came back to Lou's Pawn Shop, and at this time Green took the calculator and other merchandise into the pawn shop. While Green was in the pawn shop, defendant and McClain drove some six or seven blocks, and upon their return to the pawn shop to pick up Green, they were apprehended by Officer Jack Theriac, taken to the police station,and then back to the pawn shop. According to defendant, the pawn shop operator identified McClain as one of the parties who had been in the pawn shop with this machine, but he was unable to identify defendant. The officers then took defendant and his companions to the police station.

We have read this record, and there is slight basis for charging defendant's trial counsel with incompetence. The evidence sustains the verdict and judgment of the trial court. The penalty imposed was not unusually severe. The rights of the defendant were adequately protected by his chosen attorney. There is no error in this record which should require the reversal of this judgment, and the judgment of the Circuit Court of Madison County is affirmed.

Judgment Affirmed.

Reynolds, J., concurs.
Wright, J., concurs.

Publish abstract only.

49748

PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,	)	WRIT OF ERROR TO THE
v.	)	CRIMINAL COURT OF
JOSEPH OGLESBY (Impleaded), Plaintiff in Error.	)	COOK COUNTY.

MR. PRESIDING JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

The appellant Joseph Oglesby, together with William Geiger and Ralph Busch, was indicted for the crime of armed robbery of patrons of a card game establishment in the basement of a building at 4822 South Princeton Avenue, Chicago. Geiger was tried separately and convicted. Oglesby and Busch were to have been tried together, but prior to trial Busch pleaded guilty. After a jury trial Oglesby was convicted and sentenced to a term of from 25 to 60 years. After Oglesby's conviction Geiger was sentenced to a term of 10 to 20 years, and Busch who testified for the state received 3 years' probation. Oglesby brought this writ of error.

The principal issues on appeal are whether there was adequate proof of the taking of the money by the appellant; whether a pistol introduced in evidence was sufficiently identified as one used by Oglesby; whether the state in cross-examining Oglesby went beyond permissible limits concerning his prior convictions; and whether there was prejudicial error in the closing argument of the state and in the failure of the court to give certain instructions tendered by defendant.

Busch testified for the state on rebuttal that he met with Oglesby and Geiger on 31st Street near Indiana Avenue, in Chicago, about 9:00 P.M. on April 21, 1961. Each was armed

with a gun. They there planned and proceeded to execute the robbery in question.

Oscar Hubbard, Ethel Payne, Ruby Scott, Willie Florentino and Minnie Robinson were in the basement at the time of the robbery and each told substantially the same story. Three men wearing face masks and with guns in view surprised the occupants and compelled them to lie on the floor while their pockets and purses were examined. Ethel Payne later noticed a $2 shortage from her purse. Ruby Scott testified that $50 was taken from her purse, and Minnie Robinson testified that $13 was taken from hers.

Police Officer Charles W. Arrington, who was called by a man who happened by and observed the robbery, went there and saw twenty to twenty-five people lying prone on the floor. He and several others testified that he opened the door, identified himself as a police officer and demanded the trio's surrender. Oglesby, his mask removed, turned off one of the three lights and urged "men, get you a woman, get a woman." Oglesby grabbed Minnie Robinson; Busch grabbed Ruby Scott, and Geiger used Willie Florentino as his shield. Threats were voiced to kill the women, the door was slammed in Arrington's face, and some of the occupants pleaded with Arrington not to enter. Oglesby struck Minnie Robinson in the back of the head with his weapon and she fell to the floor.

Arrington called for police reinforcements and after the premises were surrounded, Police Officer James Doyle kicked in the front basement window, prompting Oglesby to open a gun-fire exchange with him in which Oglesby was struck. Geiger

and Busch surrendered and the police discovered a gun underneath Oglesby as he lay on the floor. Before the squadrol arrived Oglesby told Officer Arthur Adams that he "needed the money."

As the only defense witness, Oglesby told a different story. He described the basement as a policy station where no cards were played and said he and Geiger had accompanied Busch there to collect on a $100 policy ticket belonging to Busch. He further testified that Florentino told Busch his ticket was useless, provoking the struggle and gun battle which followed. He testified that the three were unarmed and unmasked upon their entry and that they wrested seven or eight pistols from the occupants of the basement during the fray and that they fired at the police because they disbelieved Arrington's claim to be a police officer. Witnesses for the state testified that they could see Doyle's police uniform through the basement window. On direct examination Oglesby acknowledged two prior robbery convictions and his possession of $150 upon the arrival of the police. He explained that $80 of the money was savings and the remainder was won in a crap game that evening. By his own admission he had been out of employment four months.

Officer Doyle testified in rebuttal that a post-arrest search revealed only three guns, not the seven or eight Oglesby testified to, and that Oglesby possessed a brown sack containing money.

Defendant argues that whether a robbery was in fact committed is definitely in dispute because despite the testimony of the complaining witnesses that certain sums of money were missing, no witness testified to seeing any money actually

being taken. Defendant unrealistically assumes that the act of taking must be observed. This is not the law. People v. Susanec, 398 Ill. 507, 76 N.E.2d 33; People v. Jett, 361 Ill. 373, 198 N.E. 143. Here, five witnesses testified to the search of the occupants after they were compelled to lie prone on the basement floor. Payne, Scott and Robinson all testified that money was taken from them. The witness Busch contradicted Oglesby as to the absence of cards and the presence of policy paraphernalia and admitted that he himself "took money off one person."

Defendant's cases are clearly distinguishable. In People v. Ohle, 408 Ill. 238, 96 N.E.2d 476, the complaining witness had been drinking with the defendant, lost consciousness, and found his wallet missing when he arrived home. In People v. Brooks, 334 Ill. 549, 166 N.E. 35, the complaining witness had been drinking with the defendant, who was his friend, and after a scuffle the complainant noticed his wallet missing. People v. Berne, 384 Ill. 334, 51 N.E.2d 578, is not in point because the question presented was not whether the robbers had taken the money, but whether the defendants were the robbers, since they had an alibi.

Defendant argues that the state failed to establish any connection between him and the revolver admitted in evidence, and that this constitutes reversible error. The general rule is that to warrant the admission of a weapon in evidence, it must be shown to have been in the possession of or under the control of the accused. People v. Smith, 413 Ill. 218, 108 N.E.2d 596; People v. Perkins, 17 Ill. 2d 493, 162 N.E.2d 385. The defendant's own testimony shows that

several times he discharged a revolver pointed toward the police officers, and it appears from the record that the revolver in evidence was the same weapon which Oglesby in his testimony referred to as the one used. Defendant dropped the weapon when he was wounded and officer Adams picked it up and brought it to a police station where Officer Doyle inventoried it and Officer Arrington recorded its serial number. After that Doyle delivered the revolver to a police custodian's office, where it was kept until he brought it into court. All three officers had observed the weapon at the armed robbery scene and were able to identify it during the trial. The record is sufficient to identify the gun produced at the trial as the one actually used in the crime.

Defendant argues that the state in cross-examining Oglesby went beyond permissible limits concerning his prior convictions. A defendant may be impeached upon the ground of his prior conviction of other infamous crimes only by introduction of the records of the prior conviction. People v. Moses, 11 Ill. 2d 84, 142 N.E.2d 1. People v. Donaldson, 8 Ill. 2d 510, 134 N.E.2d 776. Anticipating the state's use of a certified record of his two armed robbery convictions, defendant on direct examination, on questions by his own counsel, testified to two previous convictions for robbery and admitted his guilt of those two offenses. On cross-examination defendant admitted the two offenses were armed robberies, and that he had pleaded not guilty to the more recent charge and was found guilty by a jury. He was also asked to repeat his admission of prior guilt.

Defendant argues that the sole and only purpose sought to be accomplished by the prosecution was not to attack his credibility, which is proper, but to thoroughly prejudice him in the eyes of the jury and to have the jury conclude that since he had been guilty before, he was guilty of the crime for which he was now being tried. Defendant himself opened up the examination on direct. The state on cross-examination made clear that the offenses were armed robberies. Defendant's objection at the time of cross-examination was that the examination was repetitious. There is some basis for this, but the guilt of defendant was clearly proved beyond a reasonable doubt. We cannot expect in a case of this character to have before us a record completely free of error. Some recognition must be given the difficult task of the prosecuting attorneys. An error made by them is subject to judicial review, but the defense may press for any advantage it sees fit and its errors are not subject to review except in a few limited instances.

Defendant further urges that there was prejudicial error in the state's closing argument because of misstatements of fact and inflammatory remarks. The so-called "misstatements" are inferences from the testimony which the prosecution could reasonably make. The allegedly inflammatory remarks were within the bounds of fair comment.

Lastly, defendant charges error in the court's failure to give certain instructions tendered by him. We have examined them and found that they were fully covered by instructions tendered by the state and given by the court.

Judgment affirmed.

Dempsey and Sullivan, JJ., concur.

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(229)

No. 64-29 (53 I.A.2 229) Agenda 51

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NELLIE TIPSWORD,	)	
	)	
Plaintiff-Appellee,	)	
	)	Appeal from the
vs.	)	Circuit Court of
	)	Bond County,
SHERMAN L. TIPSWORD,	)	Illinois.
	)	
Defendant-Appellant.	)	

WRIGHT, Justice.

This is an attempted appeal from an order directing the issuance of a temporary injunction against the defendant entered by the Circuit Court of Bond County, Illinois, on March 24, 1964.

Prior to January 1, 1964, sub-paragraph (1) of Section 78 of the Civil Practice Act (Ill. Rev. Stat., 1963, Chap. 110) provided in part as follows:

> "An appeal may be taken to the Appellate Court from an interlocutory order or decree granting, modifying, refusing, dissolving, or refusing to dissolve or modify an injunction, or appointing or refusing to appoint a receiver, or giving or refusing to give other or further powers or property to a receiver already appointed, or placing or refusing to place a mortgagee in possession of mortgaged premises: Provided, that the appeal is perfected in the trial court and the record is filed in the Appellate Court within 30 days from the entry of the interlocutory order or decree, and provided further that

> the time for filing the record may be extended by the Appellate Court or a judge thereof in vacation. The appeal shall be perfected by the filing of a bond in the trial court, approved by the clerk or the judge thereof, to secure costs in the Appellate Court. No notice of appeal need be filed in perfecting an appeal under this section." (Emphasis ours)

The foregoing section was repealed by House Bill 779, effective January 1, 1964, and appeals from an interlocutory order or decree granting an injunction are now governed by sub-paragraph (1) of Rule 31 of the "New and Amended Rules" of the Supreme Court, 28 Ill. 2d XXX, effective January 1, 1964. Rule 31 provides in part:

> "An appeal may be taken to the Appellate Court from an interlocutory order or decree granting, modifying, refusing, dissolving, or refusing to dissolve or modify an injunction, or appointing or refusing to appoint a receiver, or giving or refusing to give other or further powers or property to a receiver already appointed, or placing or refusing to place a mortgagee in possession of mortgaged premises. The appeal must be perfected within 30 days from the entry of the interlocutory order or decree by filing a notice of appeal conforming substantially to the notice of appeal in other cases. The record must be filed in the Appellate Court within the same 30 days unless the time for filing the record is extended by the Appellate Court or any judge thereof." (Emphasis ours)

Sub-paragraph (2) of Section 76 of the Civil Practice Act (Ill. Rev. Stat., 1963, Chap. 110) provides:

> "An appeal is perfected when the notice of appeal is filed in the lower court. After being perfected no appeal shall be dismissed without notice, and no step other than that by which the appeal is perfected is jurisdictional."

The right to appeal is purely statutory and the provisions of the Civil Practice Act must be complied with in perfecting

an appeal, otherwise the appeal is not legally perfected. Shaw v. Davis, 289 Ill. App. 447, 7 N. E. 2d 331. The filing of the notice of appeal is the only jurisdictional step required by the Civil Practice Act in perfecting an appeal. East Ohio Street Hotel Corp. v. Lindheimer Co., 368 Ill. 294, 13 N. E. 2d 970. An appeal is perfected when a notice thereof is filed in the trial court in the form and within the time prescribed. When it is filed, the case proceeds in the court of review as a continuation of the one that was pending in the trial court and not as a new case. The jurisdiction of the Appellate Court to take the case attaches when the notice of appeal is filed in the lower court. Francke v. Eadie, 373 Ill. 500, 26 N. E. 2d 853. If the appellant fails to file a notice of appeal, the attempted appeal is ineffectual and will be stricken and not dismissed because there is no appeal to dismiss. Shaw v. Davis, supra; Hunter v. Hill, 284 Ill. App. 644, 2 N. E. 2d 388; Reid v. City of Belvidere, 293 Ill. App. 323, 12 N. E. 2d 684.

The abstract of the record before us does not disclose that a notice of appeal was filed in the trial court and an examination of the record does not reveal that such notice was filed.

The filing of the notice of appeal in the lower court is jurisdictional and since the record does not disclose that a notice of appeal was filed in the instant case as required by Supreme Court Rule 31, the attempted appeal is ineffectual and will be stricken from the docket.

CAUSE STRICKEN FROM THE DOCKET.

DOVE, P. J. and REYNOLDS, J., Concur.

PUBLISH IN FULL.

49622

53 I.A.2d 282

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. HENRY SMITH, Defendant-Appellant.	)	APPEAL FROM CIRCUIT COURT, COOK COUNTY, CRIMINAL DIVISION

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT:

Defendant Henry Smith was convicted, after a bench trial, of the unlawful sale of narcotics. He appeals, claiming that he was not found guilty beyond all reasonable doubt and that the court was prejudiced against him.

On May 9, 1963, at approximately 7:30 p.m., Sergeant Frank Gill of the Narcotic Unit of the Chicago Police Department, accompanied by police informer Ted Hall, met George (Sonny) West in the vicinity of Warren and Hoyne Avenues in the City of Chicago. After being introduced to West by Hall, Sergeant Gill inquired if West had any narcotics. Upon West's query as to how much he had to spend, Sergeant Gill stated that he had $40.00. As their conversation continued, West said, "We have to get off the street. There's too much heat around." The three men immediately proceeded at West's direction to a first-floor apartment in a building located at 2107 West Washington Boulevard. They arrived at approximately 7:40 p.m. and were permitted to enter by defendant who responded to the ring of the doorbell. Defendant's apartment consisted of two small rooms, a bedroom and a kitchen. Sergeant Gill testified that when they entered the bedroom a conversation took place, in the presence of defendant, wherein Sergeant Gill again asked West if he could get narcotics. West replied that he could get four tinfoil packages of stuff for $40.00, whereupon Sergeant Gill handed West $40.00. As West and defendant started to leave, Sergeant Gill protested, saying, "Wait a minute, both of you fellows aren't leaving." With that,

defendant replied that he would stay, and West left to get the narcotics. After West left, Sergeant Gill and defendant engaged in a series of conversations until West returned at 8:30 p.m. When Sergeant Gill asked how long West would be gone, defendant stated, "He should be back in ten or fifteen minutes." When Sergeant Gill inquired as to the quality of the narcotics, defendant replied, "You don't have to worry about anything. The stuff is good, and he'll be back." Subsequently Sergeant Gill asked, "Where is our man? He's been gone now about twenty, twenty-five minutes. He should be back by now." Defendant was reassuring. "Relax," he said, and continued, "Sometimes Sonny has trouble locating his man on the corner. And because of all the heat up on the corner, it took [sic] a little extra length of time to cop." In a discussion as to the manner in which Sergeant Gill took narcotics, defendant asked, "Where do you shoot stuff, man?" Sergeant Gill lifted a pants leg, pointed to the back of his knee, and replied, "In the back of my knee." When West returned to defendant's apartment about forty minutes later, Hall, defendant, and Sergeant Gill were all in the bedroom, and, in everyone's presence, West handed Sergeant Gill four tinfoil packages of narcotics, one of which Sergeant Gill opened immediately. When Sergeant Gill complained as to the quality of the narcotics and stated that he would like to try some before he left, defendant went into his kitchen, returned with two hypodermic needles and syringes, and handed them directly to Sergeant Gill. It was at this point that Sergeant Gill identified himself and placed West and defendant under arrest.

As to the events and conversations that took place in his apartment on the date in question, defendant testified that during the time that West, Hall, and Sergeant Gill were together in his apartment, he had no conversation with Sergeant Gill, did not hear any conversation

between the other men, and saw nothing pass between the parties.

To support his contention that he was not proved guilty beyond all reasonable doubt, defendant claims that he did not participate or engage in the unlawful sale of narcotics, as contemplated by the definition of "sale" in the Uniform Narcotic Drug Act (Ill. Rev. Stat. 1963, ch. 38, § 22--2 (1)). The facts do not support defendant's position that he was merely present at the scene of the crime or gave only negative acquiescence to its commission; the facts amount to aiding, abetting, and assisting in the commission of the crime. As was said in People v. Washington, 26 Ill.2d 207, 209, 186 N.E.2d 259 (1962):

> "While it is true that mere presence or negative acquiescence is not enough to constitute a person a principal, one may aid and abet without actively participating in the overt act and if the proof shows that a person was present at the commission of the crime without disapproving or opposing it, it is competent for the trier of fact to consider this conduct in connection with other circumstances and thereby reach a conclusion that such person assented to the commission of the crime, lent to it his countenance and approval and was thereby aiding and abetting the crime. [Citations omitted.] Stated differently, circumstances may show there is a common design to do an unlawful act to which all assent, and whatever is done in furtherance of the design is the act of all, making each person guilty of the crime. [Citations omitted.]"

In the case at bar defendant was present at the time the narcotics were unlawfully sold, and he did not disapprove or oppose the sale. This conduct, in connection with other circumstances, e.g., the sale's taking place in defendant's apartment and defendant's giving Sergeant Gill assurances that West would return soon with good-quality narcotics, is sufficient evidence upon which the trial judge could conclude that defendant assented to the sale, lent to it his countenance and approval, and was thereby aiding and abetting the crime.

Defendant's second contention is that the court was prejudiced against him. We have examined defendant's references to instances of

alleged prejudice on the court's part and find them without merit. There was no prejudice exhibited against defendant by the trial judge's refusal to require the State to disclose the name of the informer's wife. The name of the wife of the informer is totally irrelevant to an action for the sale of narcotics. Although the People disclosed the informer's name, there was no requirement to do so. (People v. Durr, 28 Ill.2d 308, 192 N.E.2d 379 (1963).) There being no requirement to disclose the name of the informer, there certainly is no requirement to disclose the name of the informer's wife. Defendant's argument concerning the prejudice shown on the denial of a motion for directed judgment is also without merit when one reads the entire transcript on this point. Defendant's last contention of prejudice by the trial judge for failure to allow West to state whether he had an argument with his girl friend is also without merit. Whether West and his girl friend had an argument is irrelevant to a determination of whether a sale of narcotics took place.

JUDGMENT AFFIRMED.

BURKE, P.J., and BRYANT, J., concur.

49568

53 I.A.2d 320

ELEANOR R. McGREEVY, Plaintiff-Appellant,	)	APPEAL FROM THE
v.	)	CIRCUIT COURT OF
CHICAGO TRANSIT AUTHORITY, a municipal corporation, Defendant-Appellee.	)	COOK COUNTY.

MR. PRESIDING JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

On May 4, 1964, plaintiff filed a petition for leave to appeal under Section 76 of the Civil Practice Act (Ill. Rev. Stat., ch. 110, § 76 (1963)), which was granted, and thereafter briefs were duly filed and arguments heard.

The appeal is from a judgment on a verdict of not guilty in a personal injury suit. Prior to the time of trial, plaintiff filed interrogatories asking defendant to list the names and addresses of all individuals who witnessed the occurrence or had knowledge of the relevant facts pertaining to the complaint. Defendant replied listing among others Carolyn Albers, 330 West Adams Street, and Wm. McCaffrey, 3529 West Monroe Street. These addresses were not correct. The witnesses did appear, however, and testified and they were cross-examined without objection by the attorney trying the case for plaintiff and without any request by him for an opportunity to discuss the case with the witnesses or to pursue any other investigation with respect thereto. He did not ask the court to impose any sanctions. In the absence of such objection and motion for the imposition of sanctions, there is no basis for predicating error.

Plaintiff relies heavily on Battershell v. Bowman

Dairy Co., 37 Ill. App. 2d 193, 185 N.E.2d 340, in which the court considered the propriety of sanctions against a defendant who failed to give the plaintiff the addresses of two witnesses known to it. There was timely objection in that case to the testimony of those witnesses.

Error cannot be predicated upon action which the trial court failed to take when the party seeking the review made no objection in the trial court and no request or motion with respect thereto. We must assume that the trial lawyer knew what he was doing and that the witnesses having been duly examined and cross-examined, it was considered by him that no harm had come from defendant's failure to give the correct addresses of the witnesses.

Plaintiff also charges error in that the verdict was against the manifest weight of the evidence. It appears that plaintiff designated only the transcript of the testimony of the two witnesses whose addresses had been incorrectly given, the transcript of arguments before the trial court, and the verdict and judgment to be included in the record on appeal. This was sufficient to cover the point made with respect to the two witnesses. It further appears that defendant insisted upon and procured the incorporation of a transcript of the entire proceedings by filing an additional praecipe and that the trial court then certified the record. Later, plaintiff abstracted the whole record. Under Rule 1-A of this court (Ill. Rev. Stat., ch. 110, § 201.1(a) (1963)) the appellant is required to designate what parts of the

trial court record are to be incorporated in the record on appeal. Plaintiff not having done this, defendant now contends that plaintiff is limited to a review on that portion of the record which she requested. This would be a strict interpretation, and we have decided to give consideration to plaintiff's point on the basis of all the evidence presented.

Plaintiff's claim is that while boarding defendant's bus, she was thrown backward out of the bus by reason of its jerking, lurching or moving. Other witnesses testified to the contrary. Some of these witnesses were behind the plaintiff, and plaintiff says they are not to be believed, because "it is not believable that on a cold day she could have been thrown four feet out from the bus and not hit or bumped into someone in the line behind her." It is a matter of common knowledge that no such precise analysis can be made of the testimony of witnesses in a personal injury case. The testimony of defendant's witnesses that the bus did not jerk, move or sway while plaintiff was getting on presented a clear issue of fact for the jury. Eilers v. C.T.A., 2 Ill. App. 2d 233, 119 N.E.2d 449.

The judgment of the trial court is affirmed.

Judgment affirmed.

Dempsey and Sullivan, JJ., concur.

Abstract only.

53 I.A.2 364

Consolidated Nos.
49306, 49307, 49308, 49309

JAMES PANION and GINGER PANION,
Plaintiffs-Appellants,
v.
CHECKER TAXI COMPANY,
Defendant-Appellee,
JAMES PANION and GINGER PANION,
Plaintiffs-Appellants,
v.
CHECKER TAXI COMPANY,
Defendant-Appellee,
MICHAEL SLOWICK,
Plaintiff-Appellant,
v.
YELLOW CAB COMPANY,
Defendant-Appellee,
MICHAEL SLOWICK,
Plaintiff-Appellant,
v.
YELLOW CAB COMPANY,
Defendant-Appellee.

APPEALS FROM
CIRCUIT COURT
OF COOK COUNTY

MR. JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT:

In each of these cases consolidated on appeal the appellants filed suit in the Circuit Court for injuries which they claim were caused by the negligence of the respective appellees. The particulars of the accidents involved in each case are of no importance in this appeal. On May 2, 1962, the defendants-appellees in both cases secured orders granting them judgments for failure of the appellants to answer interrogatories.

Having learned of the entry of a default judgment late in the summer of 1962, the appellants, on March 3, 1963, filed petitions under section 72 of the Illinois Civil Practice Act. At this time the appellants had answered the interrogatories, and the attorney for the appellants claimed he had no notice of motion for an order requiring answer to interrogatories or subsequent notice of the motion for judgment, which allegations were supported by supplementary affidavits. There was no denial, however, that these notices had been mailed.

The appellants also refiled their original suits. The Court below dismissed these suits on the grounds that the Statute of Limitations had expired and that the alleged judgments in the initial suits were res judicata of the second suits.

The appellants claim first that the Court below was wrong in not granting their motion under the Civil Practice Act, and second, that they should have been allowed to refile their suits, as there was no bar either from the Statute of Limitations or from the doctrine of res judicata. We hold that the Courts below were correct in both these rulings.

The Court below was clearly right in denying the appellants' petitions under section 72. That section reads in relevant part:

> (1) Relief from final orders, judgments and decrees, after 30 days from the entry thereof, may be had upon petition as provided in this section. Writs of error coram nobis and coram vobis, writs of audita querela, bills of review and bills in the nature of bills of review are abolished. All relief heretofore obtainable and the grounds for said relief heretofore available, either at law or in equity, whether by any of the foregoing remedies or otherwise, shall be available in every case, by proceedings hereunder, regardless of the nature of the order, judgment or decree from which relief is sought or of the proceedings in which it was entered. There shall be no distinction among actions at law, suits in equity and other proceedings, statutory or otherwise, as to availability of relief, grounds for relief or the relief obtainable.

(2) The petition must be filed in the same proceeding in which the order, judgment or decree was entered but is not a continuation thereof. The petition must be supported by affidavit or other appropriate showing as to matters not of record. . . .

(3) The petition must be filed not later than 2 years after the entry of the order, judgment or decree. . . .

There are many recent cases which hold that one is not entitled to the relief offered by section 72 in all circumstances. It has been held that a petitioner must show he is entitled to the relief sought. Brockmeyer v. Duncan, 18 Ill.2d 502, 165 N.E.2d 29- (1960).

In Till v. Kara, 22 Ill. App.2d 502, 161 N.E.2d 363 (1959) the court was faced with a problem where defendants in a personal injury action requested that their attorney stop his representation of them on the assurance of an insurance broker that the insurance company would defend them. Two months after the withdrawal of the defendants' attorney, a default judgment was entered against them. The court held that since the defendants had made no inquiry as to whether or not the company was in fact defending them, they were guilty of such negligence that they would not be permitted to file a petition under section 72 of the Civil Practice Act. The court said at page 509, "Section 72 of the Practice Act is not intended to relieve a defendant from the consequences of his own negligence."

The court continued at page 511, "While the trend of judicial decision may be, as defendants contend, to determine suits upon their merits and according to the substantive rights of the parties, when a party is sued and process duly issued and regularly served as provided by law and orderly procedure and practice is observed, a party must be governed by the law and rules of practice and must present his defense if he desires to contest the demand of the plaintiff for judgment. [citations omitted] A motion of the kind here presented, seeking to

set aside a final judgment of a court having jurisdiction of the parties and the subject matter, is one of serious import and if treated lightly, threatens the stability of our courts." [Citations omitted]

The appellants claim that equity demands that an opportunity be given for the case to be disposed of on its merits. In support of their contention they cite the case of Ellman v. De Ruiter, 412 Ill. 285, 106 N.E.2d 350 (1952). In that case the Supreme Court was faced with the question whether under proper circumstances equitable considerations could be brought before a court in a section 72 proceeding. The court stated at page 292:

> "While our present Civil Practice Act has not effected a complete amalgamation of the practice and procedure in common-law and suits in equity in this jurisdiction, it is our opinion that there has been a fusion sufficient to enable a court of law, when the occasion demands it, to apply equitable principles in administering the summary relief available under the motion which has been substituted for writ of error coram nobis. Stated differently, it is our belief that the motion may, under our present practice, be addressed to the equitable powers of the court, when the exercise of such power is necessary to prevent injustice."

We are in complete agreement that under proper circumstances equitable principles should be brought in while considering a petition brought under section 72 of the Civil Practice Act. We feel, however, that the appellants here have lost whatever equities they might have had on their side by the unaccountable delay in bringing their petitions. Approximately nine months were allowed to pass before the appellants brought their petitions. This, coupled with the fact that four months passed between the entry of the default judgments and the time the appellants knew that such judgments had been entered against them, plus the fact that the appellants should have answered the interrogatories in the first place, does not make out a very strong equitable case for them. We believe that the rationale of Till v. Kara (supra) is exactly in point here. These appellants have been barred from a decision on

the merits by virtue of their own negligence. No one is cheating these people out of a trial to determine the liabilities in this case; they themselves threw this right away through their own gross neglect.

The purpose of section 72 is to permit a party to bring before a court facts which were unknown to the court at the time of the entry of judgment and which, if known, would have prevented the judgment from being given. The section was not adopted by the Legislature as a substitute for a right of appeal. Village of Willowbrook v. Carlson, 42 Ill. App.2d 432, 192 N.E.2d 553 (1963), Jones v. Jones, 32 Ill. App.2d 64, 176 N.E.2d 655 (Abst. 1961). A party must use due diligence in bringing these heretofore unknown facts to a court's attention. Two things are required under a section 72 petition. First, the unknown fact, and second, due diligence in bringing the matter before the court. Williams v. Pearson, 23 Ill.2d 357, 177 N.E.2d 856 (1961). The appellants here have not shown their right to the relief sought.

We also hold that the default judgment rendered in the original suits was proper, and acts as a bar to any further filing of complaints based on the same cause of action.

In Harris v. Oxford Metal Spinning Co., 315 Ill. App. 490, 43 N.E.2d 186 (1941), the court held that a default judgment was proper where a party defendant to a suit refused to produce documents for discovery. We note that the production of documents for discovery and the answering of interrogatories are both covered by section 58 of the Civil Practice Act. If default judgment is proper for one, it should certainly be proper for the other.

Rule 19-12 of the Illinois Supreme Court allows a court to render judgment against the offending party where he does not comply with a court order to answer interrogatories. We feel that the court below did not abuse its discretion in doing so in this case. We feel that the appellants' claim that they never received the court order requiring them

to answer interrogatories is not determinative here. It is, of course, a remote possibility that the orders were mailed and yet never reached their destination. The presumption is, however, that letters arrive at their destination. Rule 7 of the Rules of the Illinois Supreme Court states that service is complete upon mailing. In addition, the attorney for the appellants admits that he knew the interrogatories were due and gave no explanation as to why they were not completed and returned. It would seem a grave injustice to permit these appellants successfully to claim here that they are entitled to a trial on the merits of their case solely on the claim they did not receive properly mailed orders from the court that they answer them. They knew they were to be answered. Since service was complete on mailing, the injustice would be greater to the appellees in taking away their judgment than it would be to the appellants in not allowing them their petition, and in barring them from filing a new claim on the same cause of action.

When a suit is dismissed in circumstances such as these, it is clear that a party will not be permitted to refile a complaint based on the same cause of action. Harris v. Oxford Metal Spinning Co., (supra).

We hold, therefore, that the courts below were correct in not allowing the appellants' section 72 petition and in striking the refiled complaints as being barred by the default judgments. The judgments are affirmed.

JUDGMENTS AFFIRMED.

BURKE, P.J., and FRIEND, J., concur.

49319

GEORGE WIENHOEBER,
Plaintiff-Appellee,
v.
MARILYN WIENHOEBER,
Defendant-Appellant.

(53 I.A.2 387)

APPEAL FROM THE
SUPERIOR COURT
OF COOK COUNTY

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT:

This is an appeal from an order of the Superior Court sustaining a motion to strike a petition filed under section 72 of the Civil Practice Act (Ill. Rev. Stat. 1963, ch. 110) which sought to vacate a decree of divorce entered on November 15, 1960. The parties to this action, George Wienhoeber, plaintiff, and his wife Marilyn, defendant, were married in 1948 and had lived in the same house until March 22, 1959, at which time plaintiff was locked out by defendant. On September 19, 1960 plaintiff and three detectives entered plaintiff's former home and found defendant and a Mr. Bothfeld together in a bedroom. Plaintiff commenced a divorce action by filing a praecipe and jury demand on September 22, 1960 and placed summons on the same day. On September 29, 1960 defendant was served with process. On November 4, 1960, on petition of plaintiff, the court, under section 7c of the Divorce Act (Ill. Rev. Stat. 1959, ch. 40), waived the sixty-day waiting period and granted leave to plaintiff to file his complaint for divorce instanter. On November 9, 1960 an order of default was entered against defendant for failure to appear and answer the complaint; on November 14, 1960, [illegible] having been waived, a default hearing was held; on November 15, 1960 the court entered a decree of divorce. At the time of the entry of the decree defendant was pregnant and plaintiff was not the father of the unborn child.

On January 10, 1961 plaintiff served notice on defendant that on January 16, 1961 he would move for an order of contempt because of her failure to comply with the terms of the decree requiring her to surrender

the children to plaintiff. A hearing was held on that date and proceedings were continued from time to time until April 10, 1961, on which date defendant filed a petition for modification of the divorce decree, praying for, among other things, custody of the children. In compliance with her prayer the court transferred custody of the children to defendant and ordered that plaintiff pay $300.00 per month for child support, establish a trust for the payment of an additional $300.00 per month for child support to be paid from the corpus of the trust, and, until the trust became operative, pay an additional $100.00 per month for child support.

On February 20, 1963 defendant filed a petition praying that the decree for divorce be declared null and void, pursuant to section 72 of the Civil Practice Act, by which she sought to toll the operation of the provision requiring the petition to be filed within two years after the entry of the decree. On July 2, 1963 the court, in compliance with plaintiff's motion, entered an order dismissing defendant's petition. This appeal followed.

For the purposes of the motion plaintiff's motion admitted those allegations of facts which were well pleaded in defendant's petition, but such admissions do not weaken plaintiff's case because the petition would have to allege facts which would show a right to the relief sought. In Brockmeyer v. Duncan, 18 Ill.2d 502, 505, 165 N.E.2d 294 (1960), the court considered the propriety of the trial court in dismissing a petition filed under section 72 and said:

> "A petition under section 72 of the Civil Practice Act is therefore the filing of a new action; and it is necessary, as in any civil case, that the petitioner allege and prove a right to the relief sought. Where the petition fails to state a cause of action or shows on its face that the petitioner is not entitled to the relief sought, it is subject to a motion to dismiss. (Glenn v. People, 9 Ill.2d 335.) . . . ."

On its face the petition in the case at bar shows that defendant was not entitled to relief because the petition was filed more than two years after the entry of the decree. Defendant attempts to escape the application of the two-year period requirement by claiming that she was under a legal disability during those two years. However, the petition made no allegations of fact to substantiate her claim; she plead conclusions, not facts. Her allegation of disability during the two-year period is contradicted by her action, in April of 1961, of filing a petition for modification of the decree of divorce in which she stated she was a fit and proper person to have custody of the minor children of the parties. The court found that she had rehabilitated herself and was then living a proper life, and entered an order awarding her custody of the children. Her statements and the court's finding in April of 1961 belie her present claim that she was under a disability at that time. She failed to plead facts which would substantiate her claim and, therefore, was not entitled to relief under section 72 of the Civil Practice Act. The trial court properly granted plaintiff's motion to dismiss defendant's petition seeking such relief.

Defendant also claims that the decree of divorce was void. Void judgments generally fall into two classifications, i.e., judgments where there is a want of jurisdiction of the person or subject matter, and judgments procured through fraud. Irving v. Rodriquez, 27 Ill. App.2d 75, 169 N.E.2d 145 (1960); Ward v. Sampson, 395 Ill. 353, 70 N.E.2d 324 (1946). Defendant claims that the judgment in the case at bar was void because of the court's entering a decree of divorce less than thirty days after the complaint was filed, and because of the court's failure to give her thirty days to answer and plaintiff's failure to serve her with a copy of the complaint.

On the basis of the decision in Van Dam v. Van Dam, 21 Ill.2d 212, 171 N.E.2d 594 (1961), involving a fact situation similar to the one

in the case at bar, we cannot agree with defendant's contention. In the Van Dam case the plaintiff commenced her suit for divorce on August 9, 1958 by filing a praecipe for summons which was served on the defendant the following day. On August 15, 1958 the plaintiff sought and the court granted a waiver of the sixty-day "cooling-off" period, and on the same day she filed her complaint for divorce. The cause proceeded to trial, and on August 23, 1958 a decree of divorce was entered. Within two years of the entry of the decree the defendant sought to vacate it under section 72 of the Civil Practice Act, alleging, among other grounds, that he had not been served with a copy of the complaint. The Supreme Court sustained the trial court's order granting plaintiff's motion to dismiss, saying (216):

> "It is clear that here the trial court had jurisdiction of both the subject matter and the parties. Jurisdiction of the subject matter is the power to hear and determine cases of the general class to which the proceeding in question belongs. (Knaus v. Chicago Title and Trust Co. 365 Ill. 588; Smith v. Herdlicka, 323 Ill. 585.) The trial court had power to hear and determine cases of the general class to which the suit in question belongs, viz., actions for divorce. The defendant was admittedly served with process and jurisdiction over his person was thus acquired. . . . ."

In the case at bar defendant claims that the trial court could not have acquired jurisdiction of the subject matter since jurisdiction is acquired only after the expiration of the thirty-day period within which defendant has to answer. We base our disagreement with this contention on People ex rel. Doty v. Connell, 9 Ill.2d 390, 393, 137 N.E.2d 849 (1956), where the court said:

> "In an obvious effort to cure these defects, the legislature omitted from the present act all mention of reconciliation conferences and provided for immediate commencement of the suit by the filing of a praecipe for summons, with the consequent prompt obtaining of jurisdiction of the subject matter and the parties." (Praecipe italicized in original; emphasis added here to prompt.)

Defendant also claims that the decree was procured through fraud. She asserts that fraud occurred because plaintiff induced her to

ignore any divorce proceeding filed by him and also because she was incompetent at the time of the divorce proceedings. She alleged no facts upon which such findings could be made. Nowhere were there any allegations of facts tending to establish that at the time she was served with summons in the divorce action she did not know that she was being sued for divorce or that she was required to file an appearance within thirty days after she was served with summons. There is no allegation in the petition that any misleading representations were made by plaintiff subsequent to his raid on her home on September 19, 1960. After the raid, which established defendant's adultery, and after being served with a summons, defendant could not rely upon plaintiff's previous representations that he would not divorce her. Defendant attaches great significance to the fact that plaintiff continued to support her and the minor children after having served her with the praecipe and summons. This amounts to nothing more than plaintiff's obligation to continue the support of his wife and minor children.

Defendant further claims that she was incompetent at the time of the divorce proceedings. However, her petition for relief alleged no facts upon which a court could find that she was, at the time of the proceedings, insane or incompetent within the legal meaning of these terms. Plaintiff testified during the divorce proceeding that defendant's doctor believed that defendant was a paranoiac--i.e., she would blame her own faults on other persons--but the doctor was not certain that this diagnosis was correct. In her petition defendant reasserted plaintiff's testimony, which was hearsay in the first instance; and plaintiff's statement was a conclusion, not a fact. Defendant simply reasserted a hearsay statement; she did not make a well pleaded allegation of fact.

Defendant's last ground urged for vacating the decree is that plaintiff filed a jury demand and then waived it without giving her an

opportunity to file her jury demand. We believe defendant lost the opportunity to demand a jury when an order of default was entered against her. In Lichter v. Scher, 11 Ill. App.2d 441, 138 N.E.2d 66 (1956), the defendant was served with summons but failed to file its appearance, whereupon a default was taken. Thereafter the plaintiff waived his demand for a trial by jury without giving notice to the defendant. The court held that where the defendant is in default for want of appearance, notice of waiver of jury demand is unnecessary.

We find no error in the order of the trial court, and it is therefore affirmed.

ORDER AFFIRMED.

BURKE, P.J., and BRYANT, J., concur.

adv 53#3

Abstract

(446)

53 I.A.2 446

General No. 64-32 October, 1964

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

FILED

DEC 1 1964

JULIUS R. RICHARDSON
Clerk Pro Tempore Appellate Court Third District

J. Pierce Myers, by his Mother and Next Friend, Phyllis Myers, and Phyllis Myers, individually,

Appellees,

vs.

Robert J. Marsell,

Appellant.

Appeal from the Circuit Court of Rock Island County

ROETH, J.

Suit was brought by plaintiff Phyllis Myers, individually and as next friend of her minor son, Pierce Myers, for injuries sustained by both of them in an automobile collision involving the automobile of the defendant and the Myers automobile driven by the minor son. A jury returned a verdict for each of the plaintiffs and from the judgments entered on the verdicts defendant appeals. The only contention made on this appeal by counsel for defendant is that plaintiffs were guilty of contributory negligence as a matter of law. This requires an examination of the evidence.

On the 4th day of June, 1963, just before the noon hour, Pierce Myers was driving the family's Volkswagon in a westerly direction along 11th Avenue in Moline, Illinois. Phyllis Myers was seated in the front seat alongside of her son and a young man was in the back seat of the car as a passenger. Defendant was driving

north on 34th Street and approaching 11th Avenue. The intersection is a T intersection with 11th Avenue apparently ending at 34th Street. A stop sign guarded the intersection, 34th Street being a through street. Plaintiff turned off 11th Avenue and proceeded to head south on 34th Street and while in the intersection the two automobiles collided. Plaintiffs' evidence relating to the collision consisted of testimony of Phyllis Myers, plaintiff; a witness, one Reverend Petrovich, who was in another vehicle at the scene of the collision and at the time of the collision; and a police officer from Moline, Illinois. Pierce Myers and the other passenger in the car both testified that they had no recollection of the accident. There is testimony that Pierce Myers suffered traumatic retrograde amnesia.

Phyllis Myers testified she was a passenger in the family car driven by her son, Pierce. He was 16 years old at the time of the accident and licensed to drive and he was driving her to work on the day in question and proceeding west on 11th Avenue. He stopped at the stop sign at 34th Street. She stated that she looked to the left or south and saw nothing. Another automobile driven by Reverend Petrovich, driving south on 34th Street, made a left turn on 11th in front of plaintiffs' automobile. Reverend Petrovich substantiated Phyllis Myer's testimony that plaintiffs' car was stopped at the stop sign and that at the time he turned he could see "no car coming from the south toward me" and that after he had completed his turn and was four or five car lengths from the intersection he heard the screeching of brakes and crash of two automobiles. Mrs. Myers testified that after the car driven by Reverend Petrovich made its turn, Pierce looked both ways and that there was nothing coming from the south and that when their

car was about one-half way to the center line of the intersection she saw the defendant's car coming over a rise on 34th Street. The speed limit at this point was 40 miles an hour. She testified that plaintiffs' car was in first gear and proceeding slowly and her opinion was that the defendant's car was exceeding the speed limit. She testified that defendant's car swerved to the left when he was approximately one-third to one-half way down the hill but did not know if the defendant was able to get back into his own lane before the collision. On cross examination Mrs. Myers was asked how she knew Pierce looked in both directions before the accident and replied, "Well, I guess I should say I know he looked. You sense these things". She was then asked, "But you don't actually know that Pierce made the observation in both directions, do you?" To which she answered, "No, sir". From the evidence in the record it appears that the front of the plaintiffs' automobile was in the south-bound lane at the time of the impact and the impact occurred in about dead center of the street, with a part of defendant's car being in the north-bound lane.

From the testimony it appears that south of 11th Avenue on 34th Street the road comes over a hill or some form of incline. Pierce Myers testified that from a point on the hill where one could clearly see the intersection, measured 450 feet to the intersection. 34th Street at 11th Avenue is 22 feet 11 inches wide and 11th Street is 26 feet 4 inches wide. An intersection sign south of the crest of the hill on 34th Street was 501 feet from the intersection. Mrs. Myers testified it was 457 feet from the intersection to the top of the hill on 34th Street. The police officer testified the distance was just under 1/10 of a mile or just under 528 feet and Pierce Myers testified that he measured

the distance at 450 feet from the point on top of the hill where "I could see the intersection clearly". The police officer testified that defendant's car left 117½ feet of skid marks, 25 feet of these skid marks prior to the impact and 92½ feet after impact.

Defendant testified that he did not see plaintiff stopped at the intersection nor did he see the other car driven by the witness Petrovich. He stated he was over the crest of the hill and about four car lengths away when he saw plaintiffs' car. That plaintiffs' car was then about one-quarter across the road into the intersection or about one-half into the north-bound lane of traffic. He further testified that he, the defendant, was approximately two car lengths or 30 feet over the crest of the hill when he saw plaintiffs' car. He further testified that the impact took place in the north-bound lane of traffic and plaintiffs' automobile was about one-half in each lane, with the imaginary center line of the road being even with the front door. The jury had a right to consider the defendant's testimony regarding the position of his automobile when he first observed plaintiffs' car. He stated he was 30 feet from the crest of the hill. He further substantiated plaintiffs' testimony when he stated that plaintiffs' car was approximately one-quarter into the intersection when he observed it. From the testimony it would appear then that he first saw plaintiffs' automobile when Mrs. Myers first observed his automobile.

On the set of facts presented by the record before us, the rules in Illinois are well settled. These rules are thoroughly analyzed in Pennington v. McLean, 16 Ill. 2d 577, 158 N.E. 2d 624, a case involving a strikingly similar set of facts as involved in the case at bar. Whether plaintiffs were guilty of contributory

negligence was a question of fact for the jury to decide.

Accordingly the judgment of the Circuit Court of Rock Island County is affirmed.

Affirmed.

Abstract

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STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

General No. 10561 Agenda No. 1

People of the State of Illinois,	)	
Plaintiff-Defendant in Error	)	Error to the
vs.	)	Circuit Court of
Donald Eugene Leek,	)	Coles County
Defendant-Plaintiff in Error	)	

PER CURIAM

Donald Eugene Leek, Plaintiff in Error, was prosecuted under a two-count indictment in the Circuit Court of Coles County. A verdict of guilty was returned as to Count I of the indictment and the Plaintiff in Error was sentenced to a term of not less than two nor more than seven years in the Illinois State Penitentiary. The count of the indictment under which the Defendant was convicted

Abstract

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

General No. 10551 — Agenda No. 1

People of the State of Illinois,	
Plaintiff-Defendant in Error,	Error to the Circuit Court of Coles County
vs.	
Donald Eugene Leek,	
Defendant-Plaintiff in Error	

PER CURIAM

Donald Eugene Leek, Plaintiff in Error, was prosecuted under a two-count indictment in the Circuit Court of Coles County. A verdict of guilty was returned as to Count I of the indictment and the Plaintiff in Error was sentenced to a term of not less than two nor more than seven years in the Illinois State Penitentiary. The count of the indictment under which the Defendant was convicted

charged that the Plaintiff in Error entered a building which was particularly described with intent to commit therein theft in violation of Section 19-1 of the Criminal Code. The indictment omitted the allegation that the Plaintiff in Error knowingly entered the building.

This cause was originally appealed to the Supreme Court and was transferred by that Court to this Court for decision. The absence of the word "knowingly" from the indictment was raised for the first time in this Court and the People, by a suggestion in lieu of filing a brief and argument, have conceded that the omission of the word "knowingly" renders the indictment fatally defective. Both the Defendant in Error and the Plaintiff in Error agree that the case of People vs. Scholl, 339 Ill. App. 7 is decisive as to the validity of the indictment. Accordingly, it is unnecessary to consider any other errors assigned.

For the reasons indicated, the conviction cannot stand; and, accordingly, the judgment of the Circuit Court of Coles County is reversed.

REVERSED

charged that the Plaintiff in Error entered a building which was particularly described with intent to commit therein theft in violation of Section 19-1 of the Criminal Code. The indictment omitted the allegation that the Plaintiff in Error knowingly entered the building.

This cause was originally appealed to the Supreme Court and was transferred by that Court to this Court for decision. The absence of the word "knowingly" from the indictment was raised for the first time in this Court and the People, by a suggestion in lieu of filing a brief and argument, have conceded that the omission of the word "knowingly" renders the indictment fatally defective. Both the Defendant in Error and the Plaintiff in Error agree that the case of People vs. Scholl, 339 Ill. App. 7 is decisive as to the validity of the indictment. Accordingly, it is unnecessary to consider any other errors assigned.

For the reasons indicated, the conviction cannot stand; and, accordingly, the judgment of the Circuit Court of Cook County is reversed.

REVERSED